



**PILLSBURY WINTHROP<sup>LLP</sup>**

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October 27, 2004

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Mr. John H. Robertus  
Executive Officer  
San Diego Regional Water Quality Control Board  
9174 Sky Park Court, Suite 100  
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ATTN: Industrial Compliance Unit

Re: Duke Energy South Bay LLC — Revised Tentative NPDES Renewal  
Permit for South Bay Power Plant

Dear Mr. Robertus:

Thank you for providing us with an opportunity to review and comment on the revised tentative NPDES renewal permit for Duke Energy's South Bay Power Plant.

**Compliance Schedule for Copper**

We have reviewed the revisions made by your staff following the September 8, 2004 Board meeting, and are particularly appreciative of the staff's inclusion of a compliance schedule for copper in the permit. This change, which is clearly allowed by law, will enable Duke Energy to continue operating the plant in compliance with the permit while it evaluates a strategy for achieving compliance with the new water quality-based effluent limitations for copper. The California Toxics Rule ("CTR") and the State Implementation Policy ("SIP") provide for several possible alternatives for addressing this issue. At this juncture, Duke Energy believes that an iterative approach may be the most viable and logical approach to evaluating these alternatives. While it is possible a solution can be identified and implemented quickly, perhaps within a year, it is also possible that the issue will be found to be more complex, and three years may not provide sufficient time for achieving compliance. Thus, at the November 10 hearing, Duke Energy may request the Board to grant a longer compliance schedule—up to the five years allowed by the CTR—so that we will not be required to reopen the permit if initial compliance strategies are unsuccessful. Please be assured, however, that Duke Energy is committed to resolving the copper issue at the earliest date that is determined to be feasible, and would not utilize the full five years unless it became necessary to do so.

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**Thermal Discharge Provisions**

We have also reviewed the operative provisions of the revised permit pertaining to the plant's thermal discharge and at this juncture are willing to accept the specific actions required by these provisions. Specifically, Effluent Limitation B.1.(a) requires the compliance monitoring point for temperature to be moved to S2 (the property line) within 36 months of permit adoption, in accordance with the workplan described in E.2 (Special Supplemental Studies and Compliance Workplans). While we are willing to relocate the compliance monitoring point, Duke Energy does not agree with Regional Board staff's assessment of the significance of the thermal effects that have been observed in the discharge channel. Further, it may ultimately be determined that a representative sample of the combined cooling water discharge cannot feasibly be collected at S2, or that the plant is unable to comply with the current thermal limits at S2 without unduly restricting the generating capacity of the plant and compromising its RMR status. In that event, Duke Energy will be required to seek an alternative resolution of this issue, which could entail seeking additional time as well as identification of an alternative compliance monitoring point, establishment of alternative thermal limits, establishment of a mixing zone, or some other alternative. By accepting the thermal provisions of the permit as currently drafted, Duke Energy is not conceding that the discharge currently has an unreasonable affect on beneficial uses of San Diego Bay. Nor is Duke Energy making an unqualified commitment that it will be able to achieve compliance with the current thermal limits at S2, or that any environmental benefits that might be gained thereby would be justified in light of the potentially significant adverse consequences to the plant's generating capacity.

For reasons set forth above and as addressed during the September 8 hearing, Duke Energy also believes that the permit findings relating to thermal effects (including Findings 14, 15, 16, 17 and 19) should be revised to conform more closely with the requirements of state and federal law and the technical information that is included in the record. In particular, we do not believe that the findings of non-compliance with Section 316(a), degradation of beneficial uses, or relating to mitigation for discharges over the past 40 years are warranted or appropriate. Conforming changes to the Fact Sheet should also be made.

**Clean Water Act Section 316(b)**

Duke Energy has no objection to the operative provisions of the permit pertaining to Clean Water Act Section 316(b). These provisions require Duke Energy to submit a Proposal for Information Collection within 12 months of permit adoption, followed by a



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Comprehensive Demonstration Study within 30 months of permit adoption demonstrating compliance with the new Phase II regulations applicable to cooling water intake structures. However, as in the case of the permit findings relating to thermal discharges, we believe that the Section 316(b) findings (specifically, Finding 20) also need to be revised to conform more closely with the requirements of applicable federal law. Conforming changes to the Fact Sheet should also be made.

### Monitoring Requirements

The revised permit contains extensive new effluent and receiving water monitoring requirements. Duke Energy is not opposed to conducting monitoring that is required by law or for which there is an adequate technical justification. However, some of the new monitoring requirements do not fit into either of these categories. Duke Energy's specific concerns are discussed below.

Monthly Monitoring for Priority Pollutants. The permit requires monthly effluent and receiving water monitoring for a number of priority metals. Under Order No. 96-05, the plant was required to monitor for heavy metals on a semi-annual basis. Review of the SBPP's semi-annual monitoring reports since 1996 indicates that cadmium, lead and mercury have never been detected in the plant's effluent. Silver was detected only once in 1999. The only metal that appears consistently in the plant's effluent (and in the receiving water) is copper. The statement on pages 3 and 49 of the Fact Sheet — that "these metals have frequently been found in the discharge in detectable quantities" — is not accurate and thus does not support the expanded monitoring requirements included in the renewal permit. Duke Energy requests that staff carefully review all of the plant's historical monitoring data and eliminate monitoring requirements that cannot be justified on the basis of historical sampling results. In particular, Duke Energy does not believe there is any basis to require continued monitoring — at any frequency — for cadmium, lead, mercury or silver. Further, increasing the frequency of monitoring for arsenic, chromium (III or VI) and zinc is unwarranted. As proposed, the permit will increase the annual cost of monitoring by more than \$100,000—an expense that will be passed directly to San Diego Gas and Electric ratepayers. Duke Energy has no objection to performing monitoring that is needed to resolve legitimate questions about the quality of the plant's effluent or receiving waters, but is opposed to monitoring for monitoring's sake.

Dissolved Oxygen. The permit also imposes a new monthly effluent monitoring requirement for dissolved oxygen ("DO"). Under Order No. 96-05, Duke Energy has been conducting receiving water monitoring for DO at 12 monitoring stations. The draft

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Fact Sheet indicates that “DO data from the discharge, at station S2 (i.e. the property line), will be compared to DO levels in the receiving water stations . . .” (see p. 51). However, receiving water monitoring station E7 is the same as S2. Thus, for all practical purposes, Duke Energy has been monitoring its effluent for DO. It is unclear whether Duke Energy may continue to monitor as it has in the past or whether a new monitoring station will need to be established to comply with this requirement. If the latter, staff needs to explain why monitoring station E7 is inadequate.

*Toxicity Monitoring.* We also question the need for monthly toxicity monitoring given that the plant has never failed a toxicity test. Duke Energy is amenable to conducting monthly toxicity monitoring for one year, but believes this requirement should be reduced to quarterly monitoring (as currently required by Order No. 96-05) if there is no indication of toxicity during the first year.

*Temporal Restrictions on Monitoring.* The permit also requires some monitoring to be performed within certain periods of the day. According to Regional Board staff, the desire is to restrict monitoring to the periods when the power plant is most likely to be operating at higher loads and, according to staff, therefore most likely to be discharging higher concentrations of the target analytes. However, outside of thermal loading, no correlation can be made between the typical power plant generation cycle and the characteristics of the power plant discharge. Furthermore, sampling of the discharge is already limited to certain periods based on the tidal cycle. Adding additional temporal restrictions on sampling will only serve to create instances where Duke Energy is physically unable to collect discharge samples in the specified time period. Since these restrictions pose practical hurdles and do not enhance the quality of the data, they should be eliminated.

*Effective Date.* Finally, the new Monitoring and Reporting Program will become effective 10 days after permit adoption (as is the case with the permit itself). Because the new program is more comprehensive than the current program, Duke Energy needs time to make necessary arrangements with its contractors and the laboratories involved in the process. For administrative convenience, Duke Energy requests that the new program become effective January 1, 2005. This will give the company a little extra time to make the arrangements to implement the expanded program. The January start date will also facilitate monthly and annual reporting (it will be on a calendar basis). Duke Energy will continue to implement the monitoring program under Order No. 96-95 for the balance of 2004.

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Thank you for the opportunity to submit these comments. We hope that our remaining concerns can be addressed satisfactorily so that Duke Energy can support issuance of the permit at the upcoming hearing.

Very truly yours,

Margaret Rosegay

cc: Members of the Board

cc: Randy Hickok  
James White  
Jane Pearson, Esq.